

NGUYEN (Migration) [2022] AATA 1794 (16 May 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Thi Ngoc Uyen NGUYEN
REPRESENTATIVE:	Mr Henry Phan (MARN: 1789973)
CASE NUMBER:	1832421
HOME AFFAIRS REFERENCE(S):	BCC2017/1438662
MEMBER:	Mila Foster
DATE:	16 May 2022
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211 of Schedule 2 to the Regulations

Statement made on 16 May 2022 at 3:37pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – sponsorship limitation requirement – relationship ceased – family violence claims – social recognition of the relationship – genuine and continuing relationship prior to family violence – sponsorship at the time of application – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; rr 1.15, 1.20

CASES

Babar v MICMSMA [2020] FCAFC 38
He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant is a Vietnamese national who applied for the visa on 20 April 2017 on the basis of her relationship with, Tuan Anh Nguyen. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not meet the requirement in cl 820.211(2)(c) and hence did not satisfy cl 820.211 because her sponsorship had not been approved due to the sponsorship limitation in r 1.20KC of the Regulations.
4. The applicant appeared before the Tribunal on 31 March 2022 to give evidence and present arguments.
5. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant meets the requirement in cl 820.211(2)(c).
8. The evidence before the Tribunal includes the Department file relating to the visa application, documents and submissions presented on review before and after the hearing, and the oral evidence given at the hearing.
9. The Department file included the following documents:
 - a. the Partner visa application form submitted by the applicant on 20 April 2017;
 - b. sponsorship forms completed by Mr Nguyen;
 - c. a statutory declaration made on 8 April 2017 by Duy Long Nguyen, who said he had known Mr Nguyen since they were teenagers;
 - d. a statutory declaration made on 18 April 2017 by Thi Thach Nguyen, a relative of the applicant who she referred to as Aunt Thach;
 - e. a statutory declaration made by the applicant sister, Thi Thuy Vy Nguyen, on 27 March 2018;
 - f. a statutory declaration made by Mr Nguyen's parents on 30 March 2018;
 - g. notes of an interview conducted by an officer of the Department with the applicant 12 April 2018;

- h. statutory declarations made by the applicant on 9 April 2018 and 15 April 2018.
- 10. The Department file did not appear to contain all the evidence the applicant had submitted in connection with her visa application. At the Tribunal's request the applicant submitted these on review. The evidence included photographs of the parties' wedding and the parties with family and friends, a bank statement issued on 15 April 2018, and wills made by the applicant and Mr Nguyen on 10 February 2018.
- 11. Documents the applicant submitted on review included the following:
 - a. a written statement made by the applicant on 28 March 2022;
 - b. a written submission dated 29 March 2022 made by the representative;
 - c. a statutory declaration made by Aunt Thach on 19 April 2022;
 - d. a statutory declaration made by Thi Tu Vu, Aunt Thach's daughter, on 19 April 2022;
 - e. a statutory declaration made by Thi Bich Ngoc Nguyen, a friend of the applicant, on 21 April 2022; and
 - f. a statutory declaration made by Thi Mai Nguyen Nguyen, a friend of the applicant, on 21 April 2022.
- 12. The Tribunal found the applicant to be a credible witness. The oral evidence she gave at the hearing was generally clear and forthright, and consistent with her written evidence, the evidence she gave during her interview with the Department, and the supporting evidence she submitted to the Department and the Tribunal.
- 13. In summary, the applicant claims she met Mr Nguyen in Vietnam in 2012 when he delivered a gift from Aunt Thach. The applicant claims the next time she had contact with Mr Nguyen was in 2016 when she spoke to him on the telephone. They met again when she came to Australia as a visitor in early 2017. She claims Mr Nguyen proposed to her in February 2017 and they married in March 2017. On review the applicant claimed that the sponsor began to subject her to family violence from early 2018 and that their relationship ceased on 12 January 2022.

Whether the parties are in a spouse or de facto relationship

- 14. Clause 820.211(2)(a) requires that at the time the visa application was made the applicant is the spouse or de facto partner of a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen, and is not prohibited by subclause (2B) from being a sponsoring partner. Subclause (2B) applies to women who were granted a Subclass 204 (Women at Risk) visa within the preceding 5 years.
- 15. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties'

household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

16. In the present case the applicant claims she was the spouse of an Australian citizen by birth. The visa application included a copy of Mr Nguyen's birth certificate and the biodata page of his Australian passport which states he is an Australian citizen. The Tribunal thus finds Mr Nguyen was an Australian citizen at the time of application. As a man and Australian citizen by birth, subclause (2B) did not prohibit Mr Nguyen from sponsoring the applicant.

Are the parties validly married?

17. If the applicant and the sponsoring partner are validly married, they may meet the requirements of a married relationship, but not a de facto relationship.
18. Submitted in connection with the visa application were copies of the parties' marriage certificate and a court document relating to the applicant's previous marriage. According to a marriage certificate issued by the NSW Registry of Births Deaths and Marriages, the parties were married on 25 March 2017 and were both divorced. According to a decision made by the People's Court District 8 Ho Chi Minh City made on 28 December 2016, the applicant's previous marriage ended by divorce on that date. The Tribunal finds on the evidence that the parties were divorced at the time of their marriage to each other and were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

19. The applicant claims she met Mr Nguyen's parents in Australia the day he proposed to her and he had spoken to her parents in Vietnam by telephone. She claims their friends and family were aware of their relationship before and after they married and that their family and friends attended their wedding. She claims that after their marriage the parties visited Mr Nguyen's parents on weekends and socialised with family and friends, mostly by sharing meals together. The statutory declarations from family and friends and the photographs presented by the applicant support these claims. The family and friends claimed to have known the applicant and/or Mr Nguyen from long periods of time and stated that they believed the parties' relationship was genuine based on their interactions with the parties. The photographs were not annotated, as the Tribunal had requested, to indicate when they were taken, who appeared in the photographs, or where they were taken. Nevertheless, they do appear to have been taken over a period of time, and show the parties alone and with other people in various different settings.
20. The applicant claims that from the time they married until they separated on 12 January 2022, the parties lived in a room in Aunt Thach's house. The parties rented the room for \$200 per week which they paid for in cash. They had no tenancy agreement with Aunt Thach nor did Aunt Thach provide them with rental receipts. The rent included the cost of electricity, water and the internet hence the parties did not have utility bills for their period of cohabitation. Aunt Thach's statutory declaration supports these claims. The applicant claims she did most of the household chores and cooking during the parties' relationship.
21. The applicant claims the parties had a joint bank account they opened for the purposes of saving for expenses they would have when they had a child. Otherwise, the parties used cash to pay for their living expenses. The applicant claims the parties initially intended to have at least two children, but she decided to postpone having children when she noticed a change in Mr Nguyen's behaviour in early 2018. She claims his gambling and drinking became problematic, and he became verbally abusive and eventually violent towards when he drank. She claims she closed the joint bank account because Mr Nguyen began

withdrawing money for gambling at clubs. The applicant provided just one bank statement which for a joint bank account she held with Mr Nguyen. The statement shows some cash deposits being made into the account however it is not apparent to the Tribunal that the account was used as a savings account given the relatively low balance and withdrawals which appeared to be for living expenses. The applicant did not identify any withdrawals made by Mr Nguyen for gambling however the Tribunal notes several withdrawals from clubs and hotels. The applicant claims the parties did not have any joint major assets or liabilities during their relationship.

22. Based on the applicant's claims the parties had only been in a relationship, married and lived together for a short period of time at the time of application. The applicant claimed that their intention had initially been to have children together, buy a car and then a house none of which eventuated. The wills the applicant presented show that the applicant and Mr Nguyen made each other the sole beneficiaries about a year after they married. The applicant claims Mr Nguyen had been good natured before his drinking problem and after the family violence began she hoped he would change. In the statutory declaration she made on 19 April 2022, Aunt Thach said that she strongly believed that during the first year of the parties' marriage they loved each other; she saw they were happy together. However, she observed that after the first year of marriage, Mr Nguyen was drunk more often and she saw him become verbally abusive and violent.
23. Having regard to the matters in r 1.15A(3), the entirety of the claims and evidence, and the applicant's credibility the Tribunal is satisfied that at the time of application the parties had made a mutual commitment to a shared life to the exclusion of others, their relationship was genuine and continuing, and they were living together. The Tribunal thus finds that the requirements of s 5F(2) were met at the time of application and that the applicant was the spouse of an Australian citizen.
24. Therefore, for the above reasons, the Tribunal finds that the applicant meets cl 820.211(2)(a).

Is the applicant sponsored?

25. Clause 820.211(2)(c) requires that the applicant was, at the time of application, sponsored by the spouse or de facto partner where such person has turned 18 (or where the spouse had not turned 18, by a parent or guardian who has turned 18 and is either an Australian citizen, permanent resident or eligible New Zealand citizen). As evidenced by Mr Nguyen's birth certificate, he had turned 18 at the time of application. Hence, the applicant had to be sponsored by Mr Nguyen at the time of application to satisfy cl 820.211(2)(c).
26. Clause 820.211(2)(c) does not however require the sponsorship to be approved. It is a time of decision requirement that the sponsorship be approved by the Minister and still be in force: cl 820.221(4). Exceptions to the approval of the sponsorship apply in certain circumstances where the relationship has ceased and the sponsor has died, a child is involved, or family violence has occurred: cl 820.221(2) or (3). The approval of sponsorship is subject to limitations contained in the Regulations which include the limitation in r 1.20KC relating to for sponsors convicted of a relevant offence. The delegate was thus in error in finding that the applicant did not meet cl 820.211(2)(c) on the basis that her sponsorship was not approved.
27. The Regulations define the 'sponsor' as a person who undertakes the obligations to assist the applicant, to the extent necessary, financially and in relation to accommodation during the relevant period: r 1.20(1), (2)(c). 'Sponsored' is not defined in the Act or Regulations however it is evident from the judgment in *Babar v MICMSMA* [2020] FCAFC 38, that the Full Court understood 'sponsored' in cl 820.211(2)(c) to mean that the applicant's sponsor

had given an undertaking of the kind required by r.1.20(2).¹ While not binding on the Tribunal, the Department's policy states in relation to partner visa applications that it is generally accepted that by signing the Form 40SP a sponsor agrees to undertake the obligations stipulated in r.1.20.²

28. Accompanying the applicant's visa application was an online 'Sponsorship for a partner to migrate to Australia' form from Mr Nguyen as well as a Form 40SP signed by Mr Nguyen on 12 April 2017. The Tribunal finds on the basis of those documents that at the time of application the applicant was sponsored by Mr Nguyen and hence satisfied the requirements of cl 820.211(2)(c).
29. As the applicant has claimed on review that the sponsor began to subject her to family violence from early 2018 and that their relationship ceased on 12 January 2022, the Tribunal has not considered the matter of sponsorship approval in relation to cl 820.221(4).

Conclusion

30. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa including the family violence provisions.

DECISION

31. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl 820.211 of Schedule 2 to the Regulations
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Mila Foster
Member

¹ [6]-[7].

² 'Form 40 sponsors and sponsorship' Procedural Instruction - Sponsors and the sponsorship undertaking - Assessing the sponsorship undertaking - Partner cases and sponsorship undertaking (updated in September 2016).

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).